Tentative Rulings for April 26, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

14CECG02928 ***Lion Raisins v. International Foodsource*** **(Dept. 502)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(24) **Tentative Ruling**

Re: ***People of the State of California v. Adam Doss and Sheldon Doss Partnership, et al.***
Court Case No. 15CECG02645

Hearing Date: **April 26, 2016 (Dept. 402)**

Motion: Motion for Order for Possession

Tentative Ruling:

To grant. Plaintiff shall provide the court with a form of order for signature, which provides either for a date certain on or after which possession will occur, or that possession shall be 30 days following service of the order on defendants.

Explanation:

The motion satisfies all the statutory requirements. The requirement of entitlement to the taking and sufficient deposit are met. Opposition has been filed, but defendants objected only to the timing of possession (i.e., that no order be granted prior to the date of this hearing), and as this will not occur, there is essentially no opposition. The motion establishes the severe hardship plaintiff will face if it does not obtain a prejudgment order for possession. Thus, there is an overriding need for the plaintiff to possess the property prior to the issuance of final judgment, and the plaintiff will suffer a substantial hardship if the application for possession is denied or limited. (Code Civ. Proc. § 1255.410, subd. (d)(2).)

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary, other than as set forth above. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 4/25/16.
(Judge's initials) (Date)

Tentative Rulings for Department 403

(2)

Tentative Ruling

Re: ***Payan et al. v. Smokey Jack LP et al.***
Superior Court Case No. 14CECG02922

Hearing Date: April 26, 2016 (Dept. 403)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Orders signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 04/25/16 .
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Doe v. Riverdale Joint Unified School District***
Court Case No. 15CECG01202

Hearing Date: **April 26, 2016 (Dept. 403)**

Motion: Defendant Riverdale Joint Unified School District's Motion for Judgment on the Pleadings

Tentative Ruling:

To grant defendant's motion for judgment on the pleadings as to the First, Second, Third, Fourth, Sixth, and Seventh causes of action of the First Amended Complaint, without leave to amend.

Explanation:

The court acknowledges that the First Amended Complaint was filed on July 9, 2015, and not June 9, 2015. The court has instructed the Clerk to correct this on the pleading itself and in the court's online case management system.

The Notice of Motion indicates that defendant raises this motion against all causes of action, but the memorandum makes it clear that it does not move against plaintiff's Fifth cause of action.

While a public school district (a public entity) owes a duty of care to its students because of its special relationship with them, that special relationship itself does not create liability, since governmental liability is created only by statute. (*Rodriguez v. Inglewood Unified School Dist.* (1986) 186 Cal.App.3d 707, 723; *Mosley v. San Bernardino City Unified School Dist.* (2005) 134 Cal.App.4th 1260, 1263; *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 932—claims by a student against a school district must be based upon statute.)

Government Code section 815.2 creates respondeat superior liability for a school district as to torts committed by its employees. That statute provides, "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity *within the scope of his employment* if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." (Gov. Code § 815.2, subd. (a), emphasis added.) Thus, if the plaintiff cannot show that the public employee was acting within the course and scope of his employment in doing the things plaintiff claims are actionable, there is no basis for imposing vicarious liability on the public entity. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1127.)

Specific to sexual torts and crimes committed by a teacher on a student, pursuant to Government Code section 815.2, a school district can only be held

vicariously liable for the acts of its administrators and employees who knew or should have known of the offending teacher's dangerous propensities, but nevertheless hired, retained and failed to properly supervise him. (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861 ("C.A.").) The California Supreme Court has expressly rejected "the theory that the district was vicariously liable for the teacher's molestation," since such acts are beyond the scope of the teacher's employment. (*C.A.* at p. 12; *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 447-452 ("*John R.*").)

Plaintiff argues as to each cause of action that she is not grounding her claims against the District on respondeat superior liability, but rather on the District's own failure to control its employee's conduct, despite the fact that it "knew or should have known" Montes was misusing his place of authority (authority which had been granted by the District) in order to engage in sexually inappropriate conduct with a female student. She argues that her claim is based on the District's own failure to control its employee.

However, these are the very same type of allegations the plaintiff made in *C.A., supra*. There, plaintiff had alleged that District employee's knew or should have known about the perpetrator's "dangerous and exploitative propensities," but "failed to provide reasonable supervision" over the perpetrator, and did not "use reasonable care in investigating" her. Plaintiff alleged defendant District "neither had in place nor implemented a system or procedure for investigating and supervising personnel to prevent pre-sexual grooming and/or sexual harassment, molestation and abuse of children." (*C.A., supra,* at p. 867.) The Court held that these allegations, if proven, "could make the District liable under a <u>*vicarious liability theory*</u> encompassed by section 815.2." (*Id.* at p. 875, emphasis added.) In other words, the District could be held liable *for the negligence of its supervisory personnel*, but not *for the actions of the perpetrator*.

The quote from *C.A.* cited by plaintiff (*C.A.* at p. 870, citing to and quoting from *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1855) does not support a different conclusion, but merely emphasizes the point noted above: allegations that District employees and supervisors knew or should have known of the perpetrator's prior sexual misconduct toward students, and that he posed a reasonably foreseeable risk of harm to students could make the District liable for the student's injuries "under a theory of <u>*vicarious liability*</u> for other school personnel's <u>*negligent*</u> hiring and supervision of the molester," but that the perpetrator's conduct "<u>*will not be imputed to the District*</u>[.]" (*C.A., supra*, 53 Cal.4th at p. 870, emphasis added.)

Nor does plaintiff's allegation that the District failed to "control" Montes' actions create a different theory of liability; it does no more than allege the District's "direct <u>*negligence*</u> for failing to protect the plaintiff," as recognized by the Supreme Court in the footnote from *Quarry v. Doe I* (2012) 53 Cal.4th 945, which plaintiff also cites to and relies on. (*Id.* at p. 961, fn. 4, emphasis added.) This provides no support at all for plaintiff's theory that the District is thereby directly responsible for Montes' *intentional* torts. *Quarry v. Doe 1* was published shortly after *C.A.*, and this footnote merely echoed *C.A.'s* holding. Under the facts as alleged by plaintiff, she may seek to hold the District responsible for *negligently* failing to protect her (i.e., its other employee's *negligent*

conduct in "failing to control" Montes), and for negligence in hiring, retaining, or supervising Montes, but she cannot hold it responsible for Montes' intentional torts.

As to two of the causes of action, plaintiff attempts a final method of making the District responsible for Montes' actions by arguing she has alleged the District *aided* Montes. This is also ineffective, since by plaintiff's own argument, this conclusion is based only on her allegations that the District placed Montes in a position where he could injure plaintiff, and it failed to supervise him, despite what the District knew or should have known about him and the danger he posed to students. These are not independent acts by another District employee (in the scope and course of his/her employment) to knowingly and affirmatively "aid" Montes in his crimes, but rather are merely the negligent acts which the authority discussed above indicated would make the District *vicariously liable* for *its other employees' negligence in hiring and failing to supervise*.

Applying these observations to the specific causes of action, it is clear that they all fail to state a cause of action against the District:

- *First Cause of Action: Invasion of Privacy*

Essentially, plaintiff's allegations against the District consist of statements that it knew or should have known about Montes' conduct in violating plaintiff's privacy rights, and yet failed to reasonably control his conduct, and thus it should be held directly liable for the violation of plaintiff's privacy. As established above, this merely alleges liability in negligence, which is insufficient for this intentional tort.

- *Second and Third Causes of Action: Violation of Civil Code Sections 51 and 51.5*

Civil Code section 51 (the "Unruh Act") provides that all persons in this state are free and equal, and are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. Plaintiff alleges that the District is a "business establishment" within the Unruh Act.

Civil Code section 51.5 prohibits discrimination, boycotting, blacklisting, or refusing to buy from, contract with, sell to, or trade with any person on account of, *inter alia,* a person's sex. Section 51.5 is not actually a part of the Unruh Act, despite plaintiff's contention that it is. (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 395.) Nevertheless, the analysis of these two statutes for purposes here are essentially the same. (See, *e.g., Semler v. General Elec. Capital Corp.* (2011) 196 Cal.App.4th 1380, 1404.) Thus, they can be analyzed together.

As a threshold matter, it is not clear that a public school district is a "business establishment" under the Unruh Act. This court's earlier ruling on demurrer merely assumed (*arguendo*) that it was for purpose of analyzing the complaint's allegations, relying on a federal district court case cited by plaintiff, *Nicole M. By and Through Jacqueline M. v. Martinez Unified School Dist.* (N.D. Cal. 1997) 964 F.Supp. 1369, 1388 ("*Nicole M.*") Further, it must be noted that in *Nicole M.* the plaintiff clearly alleged intentional conduct on the part of various school personnel within the course and

scope of employment, namely school officials' inadequate response to complaints of sexual harassment. Here, plaintiff did not. Instead, her claim is predicated on Montes' conduct which was not in the course and scope of his employment, and thus cannot be imputed to the District. As already discussed above, the allegations that the District knew or should have known about Montes conduct and that it failed to control his conduct are only sufficient to implicate other employees' negligent conduct. No willful, intentional conduct on the part of other school officials is alleged, nor has there ever been a suggestion from plaintiff that she could add such allegations. Therefore, this cause of action fails to state a claim against the District.

- *Fourth Cause of Action: Violation of Civil Code Section 51.9*

Civil Code Section 51.9 prohibits "sexual harassment" in certain business relationships, including that of a student and teacher. (Civ. Code § 51.9, Subd. (a)(1)(E).) Liability exists when 1) the defendant "has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe;" 2) the plaintiff is unable to easily terminate the relationship; and 3) plaintiff has suffered or will suffer economic loss or disadvantage or personal injury, including emotional distress.

Both sides argue about whether the alleged conduct (i.e., that of Montes) is sufficiently "pervasive and severe" to constitute the actionable harassment required under this statute. However, this issue is immaterial. Demurrer to this cause of action was initially sustained because it was predicated on making the District vicariously liable for Montes' actions, and alleged no facts making the District directly liable for this intentional tort. The only argument she offers on this motion is that the District "aided" Montes, but as discussed above, this is not based on any affirmative acts in lending him support, but only on other District employees' negligent hiring, supervision, and retention of Montes, or its negligent failure to protect. This cause of action continues to be deficient as against the District.

- *Sixth Cause of Action: Intentional Infliction of Emotional Distress*

The prior demurrer was sustained because this cause of action was predicated on the District being vicariously liable for Montes' acts. In opposition to this motion, plaintiff only offers that she has alleged the District "knew or should have known" about Montes conduct. As fully discussed above, this language is part and parcel of alleging the *negligence* of the District's supervisory or administrative personnel in hiring, retaining, and supervising Montes. It does not aid plaintiff in alleging intentional conduct that can be imputed to the District. This cause of action continues to be deficient as against the District.

- *Seventh Cause of Action: Violation of Civil Code Section 52.1 (Bane Act):*

Civil Code Section 52.1 is the "Bane Act," which provides a cause of action against those who interfere or attempt to interfere by "threats, intimidation or coercion" with the plaintiff's exercise or enjoyment of any state or federal constitutional or legal

right. As with the other causes of action, the prior demurrer was sustained because it was predicated on Montes' actions. Plaintiff's only argument on this motion is that the District is liable for failing to protect plaintiff from this violation of the Bane Act. However, as noted above, a school district's failure to protect is a claim based in *negligence*. (*Quarry v. Doe I, supra*, 53 Cal.4th at p. 962, fn. 4—noting courts have recognized a cause of action in (*inter alia*) an employer's "direct *negligence* in *failing to protect the plaintiff*, or for hiring, retaining, or supervising the perpetrator" (emphasis added).) Plaintiff continues to fail to allege an intentional act of threat, intimidation or coercion on the part of a District employee acting within the course and scope of his/her employment. This cause of action continues to be deficient as against the District.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure Section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 04/25/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 501

03

Tentative Ruling

Re: ***Ghadrdan v. Ghondaghsazan***
Case No. 15 CE CG 02624

Hearing Date: April 26th, 2016 (Dept. 501)

Motion: Plaintiffs/Cross-Defendants' Motion for Summary Judgment, or in the Alternative, Summary Adjudication of Cross-Claims

Tentative Ruling:

To deny the motion for summary judgment, and the alternative motion for summary adjudication of all six cross-claims. (Code Civ. Proc. § 437c.)

Explanation:

Plaintiff/cross-defendants Sam Ghadrdan and Samara Investments, LLC move for summary judgment on defendant/cross defendant Amir Ghondaghsazan and Silver Green Farm's cross-complaint based on the theory that Amir did not comply with a condition precedent in the Joint Venture Agreement (JVA) between the parties, namely that he repay the advances made to him by Samara before he had a right to recover any distributions from the venture. Sam argues that, since Amir did not repay more than the $1,200,000 in advances made to him, he never became a member of the joint venture, and thus he cannot prevail on any of his cross-claims based on breach of the JVA. (Civil Code § 1436; *Behrman v. Barto* (1880) 54 Cal. 131, 134.) However, the language of the JVA indicates that the parties intended that Amir would be a partner in the joint venture, and that he would be entitled to a 50% interest in the venture.

The Joint Venture Agreement, paragraph 5, states, "Although the rights, duties and obligations of the parties in the Venture shall be apportioned strictly in accordance with their respective interests in the Venture, it is expressly agreed and understood that Amir shall not be entitled to receive any distributions of income, profit or otherwise from the Venture until such time as all sums advanced by Samara on behalf of Amir for his pro rata share for the carrying charges, development costs, and other expenses involving the Venture are repaid to Samara. Until all such sums are repaid, it is expressly agreed and understood that Samara shall have and does have a lien on Amir's interest in the Venture equal to the outstanding balance owing by Amir to Samara. Thus, any distributions due to Amir from the Venture shall be paid directly to Samara in payment of the monies that Amir owes to Samara arising out of the Venture." (Exhibit B to Ghadrdan decl., Joint Venture Agreement, p. 2, ¶ 5.)

Sam[1] relies on the first sentence of paragraph 5, which does indicate that Amir is not entitled to receive any distributions from the venture until he first repays all of the amounts advanced to him by Samara. However, the second and third sentences indicate that Amir continues to have an interest in the venture despite not being entitled to receive money from the venture while he owes money to Samara. The JVA expressly states that the money that Amir might otherwise be entitled to receive from the venture will instead go to Samara to pay off his debt. (*Id*. at ¶ 5.) If Amir had no interest in the venture whatsoever until he repaid the advances, then it would make no sense for the JVA to state that his "interest" was subject to a lien by Samara, and that payments that would have been made to him should go instead to Samara.

The rest of the JVA also makes it clear that the parties intended that Amir be a 50% owner of the venture. The agreement is labeled a "Joint Venture Agreement… by and between Samara Investments, LLC… and Amir Ghondaghsazan…" (JVA, p. 1, first paragraph.) The agreement goes on to state that "Samara and Amir orally agreed to purchase and develop certain agricultural land in the County of Fresno, State of California… as a pistachio ranch…" (JVA, p. 1, Recitals, ¶ C.)

"Although title to the Property stands in the name of Samara, the parties agree and acknowledge that **Amir has a 50% interest in the Property as well as a 50% interest in the development and operation of the Property as a pistachio ranch** (sometimes collectively referred to as the 'Venture.')" (*Id*. at ¶ D, emphasis added.) "The Venture shall continue until such time as it is dissolved or the Property is sold, whichever event shall first occur." (*Id*. at p. 1, ¶ 2.)

"Since Samara and Amir **each have a 50% interest** in the Venture **each party is entitled to receive 50% of the income and profits** earned by the Venture. **Each party is also personally responsible for 50% of the losses, carrying charges, development costs, and other expenses** involving the Venture to [the] extent that the Venture does not earn sufficient income to cover these charges, costs and expenses." (*Id*. at p. 2, ¶ 3, emphasis added.)

"Although **the parties each own a 50% interest in the Venture**, it is agreed that as of November 30, 2010, Samara has advanced for Amir the sum of $758,395.12 with respect to the Venture, which he would otherwise have been obligated to contribute to the Venture as his pro rata share of the carrying charges, development costs, and other expenses involving the Venture. It is anticipated that Samara may have to advance further sums for Amir pertaining to the Venture. Therefore, Amir's obligation to Samara may increase accordingly." (*Id*. at p. 2, ¶ 4.)

Also, in paragraph 7, the JVA states that "**Although the parties have an equal ownership interest in the Venture**, it is agreed that Samara shall have the final right to make all decisions with respect to the operation and conduct of the business affairs of the Venture and that Ghadrdan as Samara's Managing Member shall have the right to

[1] The court will refer to the parties by their first names for the sake of simplicity. No disrespect is intended.

make all business decisions regarding the Venture and to execute all contracts and documents on behalf of the Venture." (*Id*. at p. 2, ¶ 7, emphasis added.)

In addition, in paragraph 8, the JVA provides that, "Except as provided in paragraph 5 hereof, no party shall sell, assign, mortgage, hypothecate or encumber any portion of their interest in the Venture unless a different agreement is made in the future. Further, in the extent that either party desires to sell and assign any portion of their interest in the Venture, the party desiring to sell and assign that interest in the Venture shall give the other party written notice of such intention and such party shall then have a 60 days right of first refusal to acquire that party's interest in the Venture at fair market value ('FMV')." (*Id*. at p. 3, ¶ 8.)

Also, "Should Samara purchase any portion of Amir's interest in the Venture as provided for in paragraph 8 hereto, then any sums owing by Amir to Samara on account of the Venture will first be deducted and the balance, if any, will be paid to Amir." (*Id*. at ¶ 9.)

Thus, the JVA clearly states that Amir has a 50% interest in the property and the joint venture, and he will share equally in the profits and losses of the venture. While the agreement does provide that his share of the profits will go to pay off the money he owes to Samara for costs and expenses, this does not mean that he had to pay all of the money before he became a full joint venturer in the pistachio farm. There is nothing in the language of the JVA that makes his membership in the venture contingent on payment of the monies advanced to him, and indeed the JVA makes it clear that he continues to have a 50% membership interest in the venture regardless of whether he pays the debt or not.

For example, neither Amir nor Samara had any right to sell of their interest in the venture without the agreement of the other party, and each party had to give the other party notice and a right of first refusal if they wanted to sell their interest in the venture. (JVA, ¶ 8.) If Samara purchased "any portion of Amir's interest" in the venture, the purchase money would go to pay off Amir's debt to Samara first. (*Id*. at ¶ 9.) This provision would make no sense if Amir had no membership interest in the venture until his debt to Samara had been paid.

Consequently, Sam has failed to meet his burden of showing that Amir was required to pay off the money advanced by Samara as a condition precedent to his being a joint venturer with Samara. At most, Amir had no right to collect distributions from the venture until the advances had been repaid, but this provision did not mean that he had no ownership rights in the venture, or that he was not a 50% member of the venture with all of the other rights provided under the JVA.

Also, to the extent that Sam argues that Amir cannot show actual damages from the alleged breach of contract and breach of fiduciary duty because he had no right to collect distributions until he paid his debt to Samara, Amir has presented evidence that he did in fact pay off his debt to Samara, and thus he had a right to distributions after the debt was paid. According to Amir's declaration, he and Samara agreed to refinance the property in 2013 for the purpose of paying off Amir's debt.

(Ghondaghsazan decl., ¶¶ 154, 155.)[2] Samara obtained a loan for $3,500,000 with the land as collateral, and that money was divided equally between Samara and Amir, with Amir's half being used to pay off the debt he owed to Samara, and the remainder going to pay off Amir's other debts. (*Ibid*.) Amir claims that Sam gave him a handwritten accounting of the distribution of the proceeds for the loan, which he submits as an exhibit to his declaration. (*Id*. at ¶ 157, and Exhibit 133 thereto.) He claims that this accounting shows that his entire debt was paid off by the loan, and that he received the remaining funds. (*Ibid*.)

The handwritten accounting does not contain any written explanation of where the funds have come from, or what the parties intended to do with them. (*Id*. at Exhibit 133.) Sam claims that he was simply trying to explain to Amir what would happen if Amir paid off his debt to Samara, which he did not do. (Ghadrdan decl., ¶¶ 18, 19, 20.)[3] It is unclear from the language of the note itself whether Sam was accounting for the proceeds of the bank loan that had already been paid and used to pay off Amir's debt, as Amir contends, or if the note was simply a hypothetical explanation of what might happen if Amir paid off the loan, as Sam claims. However, this is a question of fact that can only be resolved by the jury.

The court cannot resolve issues of witness credibility on summary judgment. Nor should it engage in weighing declarations or evidence in order to grant summary judgment. (*Estate of Housley* (1997) 56 Cal.App.4th 342, 359-360.) Since Amir has stated in his declaration that the loan was intended to pay off his entire debt to Samara, and that the proceeds were actually used to do so, the court finds that there is a triable issue of material fact as to whether Amir had complied with the requirement to repay all the money advanced to him by Samara, and therefore he was entitled to distributions from the venture after the payoff date.

In fact, Amir claims that, after the parties refinanced the property and his debt to Samara had been paid, Sam actually started to give him distributions from the venture and gave him accountings showing that he had no debt to Samara. (Ghondaghsazan decl., ¶¶ 269-278, 282-302.) There would have been no reason to pay Sam distributions to Amir if Amir still owed money to Samara, and presumably Sam would not have paid Amir anything if he believed that Amir was not a member of the venture at all, as he now claims. Thus, the alleged payment of distributions to Amir raises a triable issue of material fact as to whether Amir had paid off his debt to Samara and was entitled to distributions.

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[2] Sam objects to many paragraphs in Amir's declaration and the exhibits thereto. The court finds that most of the objections are irrelevant to the outcome of the motion, so it declines to rule on the objections, with the exception of the objections to paragraphs 154, 155, 157, 269-278, 282-302, and Exhibits 133 and 142 to Amir's declaration, which are overruled. (Code Civ. Proc. § 437c, subd. (q).)

[3] Amir objects to Sam's declaration in support of the motion. However, the court does not need to rule on the objections, as they will not affect the outcome of the motion. (Code Civ. Proc. § 437c, subd. (q).)

Furthermore, Amir alleges that, in January of 2014, Sam prepared or had his attorney prepare a new joint venture agreement for Amir to sign. (*Id*. at ¶¶ 279-280, and Exhibit 142 thereto.) The proposed joint venture agreement reiterates that Amir has a 50% interest in the venture, and states that "Out of the proceeds of the Refinancing Loan Samara received the approximate sum of One Million Seven Hundred and Fifty Thousand Dollars ($1,750,000.00) and Amir received approximately the same amount. However, **a portion of the proceeds received by Amir was paid over to Samara in reimbursement of all sums that Samara advanced on Amir's behalf**, which at the time Amir owed to Samara with respect to the Venture." (Exhibit 142, Joint Venture Agreement, p. 1, ¶ F, emphasis added.)

Amir refused to sign the new proposed joint venture agreement. (*Id*. at ¶ 279.) However, the alleged fact that the agreement was drafted by Sam or his attorney, and that it clearly states that the loan proceeds were used to pay off Amir's debt to Samara for expenses related to the venture, strongly supports Amir's claim that he paid off his debt to Samara. Presumably Sam would not have drafted and attempted to have Amir sign the new JVA if he did not believe that the loan proceeds had been used to pay off Amir's debt to Samara. Therefore, even assuming that payment of Amir's debt to Samara was a condition precedent of the JVA agreement, there is at least a triable issue of material fact as to whether Amir complied with the condition precedent. As a result, Sam has failed to show that he is entitled to summary judgment on the cross-complaint, or adjudication of the cross-claims for breach of the JVA, breach of fiduciary duty, accounting, partition, dissolution of the joint venture, or declaratory relief.

In addition, Amir alleges that, after the venture started to become profitable, Sam started to take more money out of the venture to pay his own debts, including his debt to the State Franchise Tax Board. (*Id*. at ¶¶ 283, 285, 287, 289, 291, 293, 295, 298, 301.) Amir claims that Sam concealed the fact that he was taking money out of the venture to pay his own tax debt, and that he was essentially stealing money from the company. (*Ibid*.) Again, these allegations would tend to support Amir's claims for breach of the JVA, breach of fiduciary duty, accounting, partition, dissolution of the venture, and declaratory relief. Therefore, the court intends to find that there are triable issues of material fact with regard to each of the cross-claims, and it intends to deny Sam and Samara's motion for summary judgment, as well as the alternative motion for summary adjudication.

Finally, the court intends to deny Amir's request for an order or declaration regarding certain issues that he claims are undisputed, or so clear and unambiguous as to warrant immediate resolution by the court. Such requests for affirmative relief are not proper in an opposition to summary judgment. The court's order will be limited to determining whether there are triable issues of fact that warrant denying summary judgment, or whether the facts and law are not disputed and therefore judgment in favor of Sam and Samara should be granted. Since the court has found that some triable issues exist, the court intends to deny the motion without ruling on any other issues.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 04/25/16 .
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Switzer v. Flournoy Management, LLC, et al.***, Superior Court Case No. 11CECG04395

Hearing Date: **April 26, 2016 (Dept. 501)**

Motion: Ted Switzer's Motion for Summary Adjudication of Instances of Theft by Cross-Defendant Robert "Sonny" Wood

Tentative Ruling:

To deny. (Code Civ. Proc. § 437c(f)(1).)

Explanation:

Cross-Complainant Ted Switzer now moves for summary adjudication of "portions" of the 29th cause of action of his cross-complaint (on behalf of Flournoy) against Wood. Or, as the Notice of Motion puts it, Switzer seeks summary adjudication "of 4 of the multiple causes of action comprising the 29th claim for relief (specific instances of theft by [Wood] of money belonging to nominal cross-defendant, Flournoy Management, LLC)." (Notice of Motion.)

The Notice of Motion identifies four different issues for adjudication. Switzer seeks summary adjudication that Wood is liable to Flournoy under Penal Code § 496 for treble damages for embezzling $118,325 (Issue 1), $141,700.80 (Issue 2), $32,997.97 (Issue 3), and $11,210 (Issue 4) from Flournoy.

These are not proper subjects for summary adjudication. Switzer admits in his moving papers that "the 29th claim for relief includes many, many more instances of theft than the 4 identified in this motion …" Code of Civil Procedure § 437c(f)(1) provides:

> A party may move for summary adjudication as to one or more causes of action within an action …, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto … . A motion for summary adjudication shall be granted only if it completely disposes of a cause of action … .

"[T]he intent behind the change in subdivision (f): 'It is also the intent of this legislation to stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or a defense. *(Regan Roofing Co. v. Superior Court* (1994) 24 Cal.App.4th 425, 433.)

In *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1853-1854, the court interpreted subdivision (f) as creating a means to eliminate those summary adjudication motions that would not reduce the costs and length of litigation. " '[The]

statement and the wording of subdivision (f) show clearly that the Legislature wished to narrow summary adjudication from its broad focus on "issues" (sometimes interpreted to mean only asserted "facts") to a more limited focus on causes of action, affirmative defenses, claims for punitive damages and claims that defendants did not owe plaintiffs a duty.' " (*Id.* at p. 1854.)

This approach has been followed by the Fifth District Court of Appeal in *Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, where the court held that "summary adjudication is meant to dispose of an entire substantive area." (*Id.* at p. 97.) "The purpose of the enactment of Code of Civil Procedure section 437c, subdivision (f) was to stop the practice of piecemeal adjudication of facts that did not completely dispose of a substantive area." (*Ibid.*) That is what this motion seeks to do.

In this case, granting the motion would not resolve any cause of action. The court does not view the individual acts addressed by the motion as separate causes of action. In contrast with the individual checks negotiated by the bank in *Fineman Co. v. Superior Court* (1998) 66 Cal.App.4th 1110, and the legal services performed in two different matters at two different times in *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, this case appears more akin to the separate and distinct acts of discrimination that were not subject to summary adjudication in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243. Switzer and Wood formed Flournoy Management and entered into a partnership agreement whereby all revenue from sales by Epsilon Distribution or Access Medical occurring after 5/1/11 would be deposited into Flournoy's accounts, and Flournoy would reimburse the business entities for their expenses attributable to the sale, and then distribute the profits to Wood and Switzer in equal shares. All sales occurring prior to 5/1/11 would be the property of the invoicing entity. The "thefts" by Wood were allegedly part of a pattern of conduct whereby Wood did not turn over to Flournoy money that he was obligated to turn over pursuant to the operating agreement. These are contractual breaches that Switzer is re-casting as theft. (See Switzer's Cross-Complaint ¶¶ 40-45, 192.) Switzer cites to no authority providing that each action that could be considered a breach of contract may be separately summarily adjudicated, even if it does not resolve the entire breach of contract cause of action. That is essentially what the motion seeks to do.

Moreover, though Switzer states that the four alleged acts of theft are alleged in the 29th cause of action, in fact this cause of action does not plead, allege or identify any separate acts of theft. It does not specifically allege anything. Instead, the 29th cause of action incorporates by reference the 17th, 19th, 20th and 27th causes of action, which likewise do not allege any specific acts of theft [other than the 27th cause of action, which is not relevant to this motion]. None of these causes of action identify the specific acts of alleged theft raised in this motion. In light of the central role that the pleadings play in defining the issues for summary judgment or summary adjudication (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258 [pleadings serve as "outer measure of materiality"]), the court is hesitant to summarily adjudicate specific acts as individual causes of action that are not pled as such and that are not specifically alleged or identified in the cross-complaint.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 04/25/16 .
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Mavarkis v. Regents of the University of California***
Superior Court Case No.: 14CECG00353

Hearing Date: April 26, 2016 (**Dept. 501**)

Motion: By Defendants Regents of the University of California, Ivy Darden, Muhammad Sheikh, Rabindra Kundu, Jayanta Choudhury, and David Limsui for summary judgment or, in the alternative, summary adjudication

Tentative Ruling:

To grant summary judgment. The prevailing party is directed to submit directly to this Court, within 5 days of service of the minute order, a proposed summary judgment order that complies with Code of Civil Procedure section 437c, subdivision (g), as well as a proposed judgment consistent with the summary judgment order.

The Court sustains Defendants' evidentiary objections, and overrules Plaintiff's evidentiary objections.

The Court has not considered the reply/responsive separate statement or the additional evidence submitted with the reply. (Code Civ. Proc. §437c, subd. (b)(4); *San Diego Watercrafts v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 312-316.)

The Court grants Plaintiff's request to exceed the page limit submitted to this Court on April 6, 2016.

Trial and all future hearing dates are vacated.

Explanation:

Defendants Regents of the University of California, Ivy Darden, Muhammad Sheikh, Rabindra Kundu, Jayanta Choudhury, and David Limsui ("Defendants" or "Individual Defendants") for summary judgment or, in the alternative, summary adjudication.

A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (Code Civ. Proc. § 437c, subd. (p)(2).)

The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., §437c, subd. (c).) The presence of a factual dispute will not defeat a motion for summary judgment unless the fact in dispute is a material one. (*Saldabna v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1518.)

Issue #1: The entire action is barred because Plaintiff failed to exhaust mandatory judicial remedies

Defendants have failed to meet their burden to show entitlement to summary judgment on this ground because there are no facts in the separate statement that show that the administrative procedure possessed a judicial character sufficient to invoke the doctrine of exhaustion of judicial remedies and in fact, the evidence submitted by Defendants indicates that it does not. (*Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 364-365.)

The evidence submitted does not demonstrate, with undisputed facts, that there was a prior administrative proceeding possessing the requisite judicial character that yielded a decision adverse to Plaintiff such that res judicata principles could be fairly invoked to bar this action. They have not shown that and in fact, the Housestaff Handbook does not indicate that testimony at the hearing is given under oath or affirmation; it does not indicate that a party has the ability to subpoena, call, examine, and cross-examine witnesses, to introduce documentary evidence, and to make oral and written argument; it does not indicate that there is someone there to take a record of the proceeding.

The motion on this issue is denied.

Issue #2: The first, third, fourth, and sixth through eighth causes of action fail because the university had legitimate reasons for its decisions, unrelated to Plaintiff's characteristics or complaints

This adjudication is based on the following facts: (1) the undisputed fact that Plaintiff Anastasios Mavrakis ("Plaintiff")was employed by UCSF-Fresno from July 2010 to May 17, 2012; (2) Plaintiff was supervised by Defendant Dr. Muhammad Sheikh, chief of hepatology, director of clinical research, and fellowship program director from July 2010 to late March 2012; (3) from September 2010 to February 2012, Drs. Sheikh and Darden received 12 complaints from physicians, staff, and patients regarding Plaintiff's performance and demeanor including concerns about Plaintiff's lack of professionalism, physically pushing staff, pushing a patient's wife, argumentative tone, rudeness, and lack of organization skills, attention to details, follow-through, and process knowledge. At least three physicians no longer wanted to work with Plaintiff; (4) Dr. Sheikh told Plaintiff of the complaints and others' perceptions of his behavior and performance, and coached Plaintiff on how to succeed in the fellowship program, and urged him to improve his behavior; (5) Dr. Sheikh warned Plaintiff as early as 2010, and again in 2011, that his continuation in the fellowship program was in jeopardy because of the concerns expressed by many about Plaintiff. Plaintiff knew that Dr. Sheikh was

attempting to help him correct his behavior. (6) Plaintiff understood the concerns expressed about him were serious and that Dr. Sheikh was genuinely concerned about and not exaggerating the complaint he has received about Plaintiff; (7) as a result of the many reported incidents and continuing complaints about Plaintiff, he was placed on a three-month probation on February 7, 2012. He was expressly warned that any additional reported issues with behavior or unprofessionalism could result in discipline, including termination; (8) Plaintiff understood that in order to remain in the fellowship program he needed to do a "very good job" and there could not be any further complaints about him; (10) while Plaintiff was on probation. Drs. Sheik and Darden received eight more complaints about Plaintiff, of which he was advised, including Plaintiff pressuring a staff member and a physician to write favorable statements about him, his aggressive demeanor and tone, and his continued unprofessional conduct; (11) Dr. Sheikh no longer supervised Plaintiff after March 2012 as a result of Plaintiff's complain to human resources concerning alleged [discriminatory] comments made by Dr. Sheikh to Plaintiff and Dr. Darden assumed responsibilities for overseeing Plaintiff's performance in lieu of Dr. Sheikh; (12) as a result of the continuing complaints about Plaintiff, rather than terminating Plaintiff's employment, Dr. Darden decided to extend Plaintiff's probation on April 13, 2012 to give him additional time to approved and Plaintiff was again warned that any further issues with his behavior or unprofessionalism could result in discipline, including termination; (13) Dr. Darden received three more complaints about Plaintiff during the extended probationary period (April 13, 2012-May 17, 2012) including that Plaintiff falsely claimed he did not have sufficient notice of a presentation during which he performed poorly, and substandard patient care; (14) as a result of the continuing complaints about Plaintiff's inappropriate behavior and performance below expectations despite the opportunities given to him to improve, Dr. Darden determined there was no option but to terminate Plaintiff's employment effective May 17, 2012; (15) neither Dr. Sheikh, Dr. Kundu, Dr. Choudhury, nor Dr. Limsui (all named Defendants) was involved in the decision to extend Plaintiff's probation on April 13, 2012, or to terminate his employment on May 17, 2012; (16) Plaintiff admitted Drs. Sheikh, Kundu, Choudhury, or Limsui did not want Plaintiff to fail in the fellowship program; (17) Dr. Darden believed the incidents leading to Plaintiff's probation, extension of probation, and termination occurred as reported to her and warranted the discipline imposed and she had no information suggesting that any of the incidents were false, exaggerated, or inaccurate; (18) Plaintiff does not dispute that individuals complained about him to Drs. Sheikh and Darden, but simply denies that he did anything wrong during the reported incidents.

Defendants say that these seven claims fail because Defendants had a legitimate reason for its decision to terminate Plaintiff's employment. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 803; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354.) Reasons to terminate an employee, even if foolish or trivial or baseless, are permissible, unless the terminated plaintiff employee makes a showing that the employer's justification is a pretext. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 362.)

In a discrimination case, on a motion for summary judgment, an employer can carry the burden the employee's action has no merit by showing some legitimate,

nondiscriminatory reason for the action taken against the employee. (*Caldwell v. Paramount Unified School District* (1995) 41 Cal.App.4th 189, 202-203.)

If the employer meets this initial burden, to avoid summary judgment the employee must produce "substantial responsive evidence that the employer's showing was untrue or pretextual," thereby raising at least an inference of discrimination. (*Hersant v. California Dept. of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005.) A plaintiff's suspicious of improper motives, based primarily on conjecture and speculation, are insufficient to raise a triable issue of material fact to withstand summary judgment. (*Kerr v. Rose* (1990) 216 Cal.App.3d 1551, 1564.)

The undisputed facts show that Drs. Sheikh and Darden were aware of at least 23 complaints about Plaintiff from a wide range of individuals including physicians, patients, supervisors, and staff, raising serious and consistent concerns about Plaintiff's lack of professionalism, tone, dishonesty, patient care, and his physically and verbally inappropriate conduct.

Plaintiff does not dispute facts #1 and 2, but he disputes fact #3, because one of the complaints in December of 2012 did not occur because Cohen denied making a complaint; another complaint was rescinded after an investigation cleared Plaintiff. Plaintiff contests the factual bases of the claims against him, and disputes the materiality of the complaints received because he received satisfactory evaluations throughout his fellowship. Plaintiff disputes fact #4, in that he was not counseled by Dr. Sheikh on all occasions and says that some occasions were never mentioned to him and sometimes Dr. Sheikh told Plaintiff to avoid a person, otherwise Dr. Sheikh would scold Plaintiff and threaten him with deportation. The other disputations all concern the complaints themselves (facts #5, 6, 7, 10, 11, 12, 13, 14). Other disputations of facts concern when Drs. Darden, Sheikh, Kundu, Choudhury, and Limsui all learned about the complaints of illegal billings that Plaintiff made, him saying that they all knew about it no later than March 20, 2012, when his then-attorney, Warren Paboojian, faxed a letter to Drs. Voris, Peterson, and Darden on March 20, 2012, which is after he had already been placed on probation on February 7, 2012. Certainly these disputations are not "substantial responsive evidence that the employer's showing was untrue or pretextual," thereby raising at least an inference of discrimination. (*Hersant v. California Dept. of Social Services, supra,* 57 Cal.App.4th 997, 1004-1005.)

None of Plaintiff's disputations of Defendants' facts raise a triable issue of material fact, nor do Plaintiff's additional facts. Plaintiff's favorable impressions of himself, his performance, and qualifications are irrelevant to overcome a motion for summary judgment based on the ground that Defendants had legitimate, good-faith reasons to terminate Plaintiff's employment. An "employee's subjective personal judgments of his or her competence alone do not raise a genuine issue of material fact." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 816.)

As to the additional facts presented by Plaintiff, based on the opinions of nurses and physicians at the Veterans' Administration – Osburn, Johnson, Skirka, Murphy, and Vlymen, they did not supervise Plaintiff, they were not faculty, and were not tasked with assessing Plaintiff's performance as a fellow, are likewise irrelevant. "The analysis of

pretext focuses only on what the decision maker, and not anyone else, sincerely believed." (*Little v. Illinois Department of Revenue* (7th Cir. 2004) 369 F.3d 1007, 1015.)

The university has discretion to determine if a fellow receives a passing grade and certifying that the fellow has the requisite skills and judgment to work as a GI specialist with other physicians and the public in a competent and professional manner. "A court may not reevaluate such business decisions made in good faith nor second guess an employer's business judgment in an effort to find some possible violation of law [to find pretext]." (*Madden v. Independence Bank* (D.C. Cal. 1991) 771 F.Supp. 1514, 1517.) In determining the existence of pretext, "[a] court does not sit as a super-personnel panel. Even a bad or mistaken business decision does not violate Title VII if the basis for that decision is not retaliatory." (*Willis v. Marion County Auditor's Office* (7th. Cir. 1997) 118 F.3d 542, 548.)

While Plaintiff's opposition focuses on Drs. Yap, Sheikh, Kundu, and Choudhury, the opposition is completely devoid of any evidence that the decision maker, Dr. Darden, who extended Plaintiff's probation and decided to terminate his employment, bore any discriminatory or retaliatory animus. Dr. Darden stated in her declaration that she believed the incidents leading to Plaintiff's probation, extension of probation, and termination, actually occurred and warranted the discipline imposed. She had no information suggesting that any of those incidents were false, exaggerated, or inaccurate. (Decl. of Ivy Darden, ¶32.)

None of the facts Plaintiffs submitted indicate that the Individual Defendants, and in particular, the decision maker, Dr. Ivy, knew about the complaint Plaintiff had made about the fraudulent billing practices. Plaintiff attempts to dispute this fact, fact #21, with evidence that Drs. Darden and Sheikh were made aware of the complaint in a letter faxed by Plaintiff's then-attorney, Warren Paboojian, to Dr. Sheikh's supervisors, Dr. Voris and Dr. Darden, on March 20, 2012, based on Plaintiff's declaration of the fact that the letter was faxed, and the contents of the fax. (Decl. of Anastasios Mavarkis, ¶28, exhibit E.) The letter does not mention Plaintiff's reporting of fraudulent billing practices.

For these same reasons, Plaintiff cannot create a triable issue of material fact by denying the incidents or suggesting they were minor. (*Elrod v. Sears, Roebuck and Co.* (11th Cir. 1991) 939 F.2d 1466, 1470.)

Nor can Plaintiff compare his conduct and others' conduct. "To show that the employees allegedly receiving more favorable treatment are similarly situated…the individuals seeking relief must demonstrate, at the least, that they are similarly situated to those employees in all material respects." (*Moran v. Selig* (9th Cir. 2006) 447 F.3d 748, 755.) This normally requires a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without differentiating or mitigating circumstances as would distinguish their conduct or the employee's treatment of them. (*Williams v. Presidential Pavilion* (N.D. Ill. 2007) 2007 WL 1772975 at *10.)

The burden-shifting approach applies to the civil rights claims brought under 42 U.S.C. section 1983 as well. (A*nthoine v. N. Cent. Counties Consortium* (9th Cir. 2010) 605 F.2d 740, 753; *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 506 [fn. 1].)

The motion for summary adjudication of the first, third, fourth, and sixth through eighth causes of action is granted.

Issue #3 Plaintiff cannot establish even a prima facie case under the sixth through eighth causes of action under 42 U.S.C. §1983 because the individual defendants were unaware of Plaintiff's alleged complaint

Defendants present facts #20 and 21 to demonstrate that none of the Individual Defendants knew that Plaintiff had reported the improper billing practices.

Plaintiff's disputation and additional facts do not raise a triable issue of material fact concerning these adjudications, because Plaintiff's evidence, in the a letter faxed by Plaintiff's then-attorney, Warren Paboojian, to Dr. Sheikh's supervisors, Dr. Voris and Dr. Darden, on March 20, 2012, did not mention fraudulent billing practices, only the alleged mistreatment by Dr. Sheikh. All of these causes of action allege violation of Plaintiff's civil rights were based on his reporting of the allegedly fraudulent billing practices.

The motion for summary adjudication of the sixth through eight causes of action is granted on this issue #3 as well.

Issue #4: As to the second and fourth causes of action the alleged conduct was not based on Plaintiff's protected characteristics

Issue #5: As to the second and fourth causes of action the alleged conduct was insufficiently pervasive

Issue #6 As to the second and fourth causes of action, the alleged conduct was insufficiently severe

The two causes of action, the second and fourth, are the harassment and failure to keep the work place free from harassment claims. All three of the issues sought to be adjudicated are based on one fact, fact #22, which are that Drs. Sheikh and Kundu made two offensive comments about Plaintiff's religion (Christian), one comment about his national origin (Greek), three comments about his perceived sexual orientation (gay), and one comment about his marital status (single).

The evidence to support fact #22 is based on Plaintiff's deposition testimony at pages 71:19-20, 130:4-22, 133:4-6, 103:3-35, 113:13-17, 117:36, 121:18-19, 122:1-9, 126:4012, 194:13-195:1, 103:5-9, 204:10-22, 205:18-21, attached as exhibit A to the declaration of attorney Delia Isvoranu.

To establish a prima facie case of hostile work environment against an employer or entity defendant, for conduct directed at plaintiff, the plaintiff must show: (1) that

plaintiff was an employee of or a person providing services under a contract with defendant employer or an unpaid intern or volunteer; (2) that plaintiff was subjected to unwanted harassing conduct because plaintiff was a member of the group with the protected status; (3) that the harassing conduct was severe or pervasive; (4) that a reasonable member of the protected group, in plaintiff's circumstances would have considered the work environment to be hostile or abusive; (5) that plaintiff considered the work environment to be hostile or abusive; (6) that a supervisor engaged in the conduct OR that defendant or his/her/its supervisors or agents knew or should have known of the conduct and failed to take immediate and appropriate corrective action; (7) that plaintiff was harmed; and (8) that the conduct was a substantial factor in causing plaintiff's harm. (Judicial Council of Cal. Civ. Jury Instns. (Dec. 2015 rev.) CACI No. 2521A.)

The handful of innocuous comments made do not rise to the level of harassment actionable as a hostile work environment. (*Rogers v. City of Chicago* (7th. Cir. 2003) 320 F.3d 748, 752.) The conduct here was not based on Plaintiff's protected characteristics. (*Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 273-274.)

The comments here, "When Jesus Christ comes back to earth, it is going to be in a mosque" made by Dr. Sheikh cannot be understood as applying to Plaintiff, nor were the comments by Dr. Kundu (who practiced in England) that "medicine in Europe sucks" as being directed at Plaintiff because he is Greek. Finally, the alleged comment by Dr. Sheikh that "something is wrong with you, that's why you are unmarried" is too vague to ascribe to it any improper meaning. Perhaps Dr. Sheikh simply thought Plaintiff was socially awkward, unprofessional, or abrasive, having nothing to do with any protected characteristic. "Simple teasing, sporadic use of abusive language, offhand comments, jokes related to protected status, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 788.)

Additionally, the conduct was insufficiently pervasive because it didn't constitute a continuous and regular period of harassment. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 611-612.)

Finally, the conduct was insufficiently severe, because it did not rise to the level of a change in the terms and conditions of employment. (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 788.)

Again, in opposition, Plaintiff presents evidence of what Dr. Yap allegedly did him, (calling him a "fag" having "faggy friends" and "faggy clothes") and yelling at Plaintiff while he was learning endoscopic procedures, taking the endoscope away from him, "insulting and mak[ing] demeaning comments" to Plaintiff, treating Plaintiff in a way he did not treat other fellows with his "hostility" so bad that it affected the nurses in the procedure room and made it more difficult for Plaintiff to learn endoscopic procedures. The other disputations involve complaints being made about Dr. Yap's rudeness.

The additional facts apparently directed at these issues sought to be adjudicate are the same as for the disputations: Dr. Yap would yell at Plaintiff while he was learning endoscopic procedures, take the endoscope away from him, insulting him and making demeaning comments about him, treating him in a way he would not treat other fellows, thereby creating a "hostile environment" for Plaintiff, affecting the nurses in the procedure room by making them feel nervous and more difficult for Plaintiff to learn endoscopic procedure. (Plaintiff's additional facts #24-26.)

Summary adjudication of these causes of action is granted.

Conclusion

Because the adjudication of all the remaining causes of action disposes of the action, a judgment should be submitted, as well as a proposed summary judgment order that complies with Code of Civil Procedure section 437c, subdivision (g). Trial and all future hearing dates are hereby vacated.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 04/25/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 502

(2) **Tentative Ruling**

Re: ***Johnson v. Cortez et al.***
Superior Court Case No. 15CECG03007

Hearing Date: April 26, 2016 (Dept. 502)

Motion: Motion to dismiss

Tentative Ruling:

To deny David Cortez's motion to dismiss.

Explanation:

Defendant David Cortez has failed to provide proper authority to support the dismissal of this action. The only authority provided is Code of Civil Procedure §583.210. However, there is no showing that the plaintiffs are in violation of that statute. The records show that the plaintiffs have timely served all named defendants pursuant to Code of Civil Procedure §583.210. Proper proofs of service have been filed. Defendant David Cortez asserts that the plaintiff have not served the proper party. In essence he appears to be arguing that the plaintiffs have not named the proper party or parties. Such a challenge is not properly made through a motion to dismiss.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4/22/16.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***McDonald v. Beck***, Superior Court Case No. 13CECG03807

Hearing Date: **April 26, 2016 (Dept. 502)**

Motion: Motion for Leave to Amend Complaint

Tentative Ruling:

To grant on the conditions set forth below. (Code Civ. Proc. § 473.) Plaintiff shall file the revised Third Amended Complaint within 10 days of service of the order by the clerk.

Explanation:

"The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading ... " (Code Civ. Proc. § 473(a)(1) (emphasis added).) The court's discretion will usually be exercised liberally to permit amendment of the pleadings. (See *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939; *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596; *Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428.) Plaintiff has complied with Rules of Court, Rule 3.1324.

The proposed amendment merely corrects a pleading deficiency identified in the order granting the motion to expunge. To the extent defendant disputes the merit of those allegations, such disputes can be raised in the context of an appropriate motion.

However, two changes need to be made to the proposed amended pleading. First, specific performance and constructive trust are not causes of action, but are equitable remedies. (See *Golden West Baseball Co. v. City of Aneheim* (1994) 25 Cal.App.4th 11, 49.) This should be corrected by alleging specific performance and specific trust as remedies, not as a standalone cause of action. Second, the proposed amendment includes the third cause of action for interference with prospective inheritance. On August 7, 2014 the court sustained a demurrer to this cause of action without leave to amend. (RJN Exh. 1.) Before filing plaintiff should delete the third cause of action.

All objections to the Georgeson declaration are overruled.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4/22/16.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Zepeda v. Wynnstar Enterprises, LLC***
Superior Court Case No.: 15CECG01967

Hearing Date: April 26, 2016 (**Dept. 502**)

Motion: (1) By Defendants Wynnstar Enterprises, LLC, William Williams, and Mary Williams, to set aside and vacate defaults;

(2) By Plaintiff Tomas Zepeda for right to attach order and writ of attachment

Tentative Ruling:

To grant the motion to set aside default, in part, ordering the default of William Williams to be set aside, and to grant Plaintiff's request for statutory reasonable costs and expenses to be paid by attorney Randolf Krbechek to Plaintiff in the amount of $341.75, with Mr. Williams' answer to be filed within 10 days after service of this minute order, and to deny the remainder of the motion; to deny the application for right to attach order and writ of attachment.

Explanation:

Motion to set aside default

The time to make a motion to set aside under the attorney affidavit-of-fault provision of Code of Civil Procedure section 473, subdivision (b), runs from the entry of the default judgment, not the original default. (Code Civ. Proc., §473, subd. (b); *Sugasawara v. Newland* (1994) 27 Cal.App.4th 294, 297.) Because no default judgment has been entered in this case, the motion is timely.

It is not required that the defendant show that the attorney's neglect was excusable neglect nor show diligence short of the six-month time limit after entry of the default judgment. (*Metropolitan Service Corp. v. Casa de Palms, Ltd.* (1995) 31 Cal.App.4th 1481, 1488; *Martin Potts and Associates, Inc. v. Corsair, LLC* (2016) 244 Cal.App.4th 432, 438.)

The requirement that the proposed pleading accompany the motion applies only to motions for discretionary relief. (Code Civ. Proc., §437c, subd. (b) "Application for this relief…" applies to discretionary relief based on "mistake, inadvertence, surprise, or excusable neglect.")

Here, there is nothing to indicate that the default was the fault of anyone but Mr. Krbechek, such as was the case in *Cisneros v. Vueve* (1995) 37 Cal.App.4th 906, 912, where the default was entered before the attorney was even representing the clients.

The remainder of the motion is denied because the answers of Wynnstar Enterprises, LLC and Mary Williams were not stricken; only the answer of Mr. Williams was stricken by way of the Court's February 4, 2016, order.

Right to attach order and writ of attachment

The application for right to attach order and writ of attachment order are denied.

The declaration of Plaintiff Tomas Zepeda makes it clear that attachment is sought on the August 14, 2013, agreement between him and Defendants Bill Williams and Mary Williams.

Defendant Wynnstar Enterprises, LLC, is not a party to this agreement.

There is no showing that the claim against the Williams arises out of the conduct of them of a trade, business, or profession. (Code Civ. Proc., § 483.010, subd. (c); *Advance Transformer Co. v. Superior Court* (1974) 44 Cal.App.3d 127, 134.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4/25/16.
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Hawkins v. Sierra Meadows Senior Living***
Court Case No. 14CECG03808

Hearing Date: **April 26, 2016 (Dept. 502)**

Motion: Petition to Approve Compromise of Pending Action concerning a Disabled Adult

Tentative Ruling:

To continue to Tuesday, May 10, 2016. Petitioner's counsel is ordered to submit a supplemental declaration setting forth the actual time spent on the case by timekeeper, and showing each timekeeper's billing rate. The supplemental declaration shall be filed no later than Monday, May 2, 2016.

Explanation:

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4/25/16.
(Judge's initials) (Date)

Tentative Rulings for Department 503

(19) **Tentative Ruling**

Re: ***Hubbell v. Anderson***
Court Case No. 14CECG03710

Hearing Date: April 26, 2016 (Department 503)

Motions:
1) Defendant Anderson Motion to Compel Further Responses to Form Interrogatories, Set No. 1
2) Defendant Anderson Motion to Compel Further Reponses to Requests for Admission, Set No. 1
3) Defendant Anderson Motion to Compel Further Responses to Document Demand, Set No. 1
4) Defendant Anderson Law Motion to Compel Further Responses to Form Interrogatories, Set No. 1
5) Defendant Anderson Law Motion to Compel Further Reponses to Requests for Admission, Set No. 1
6) Defendant Anderson Law Motion to Compel Further Responses to Document Demand, Set No. 1

Tentative Ruling:

To grant as to motions to compel further responses to requests for admission, and order that further responses without objections be served on or before May 17, 2016. To deny as to all other motions. To deny all requests for sanctions.

Explanation:

1. Motion Deadline is Jurisdictional

> "Prior to 1986, the procedure to compel a party to respond to interrogatories or requests for the production of documents was substantially different from the current provisions of the discovery law. Before 1986, a motion to compel further responses to interrogatories required that the propounding party '... move the court for an order ... within 45 days from the date of service of the answers or objections *unless the court, on motion and notice, and for good cause shown, enlarges the time*. Otherwise, the party submitting the interrogatories shall be deemed to have waived the right to compel answers pursuant to this section.' "
>
> *Sexton v. Superior Court* (1997) 58 Cal. App. 4th 1403, 1406 (emp. In orig.).

The Court then looked at a case where no such motion for an extension was filed, but a motion to compel further responses came after the deadline. There, "Because the motion to compel was not timely, the court held that the trial court's order granting the motion was in excess of its jurisdiction." (*Id*. at 1408, citing *Vidal Sassoon, Inc. v. Superior Court* (1983) 147 Cal. App. 3d 681.)

Sexton's finding that the Legislature's deadlines on discovery motions was applied to the 60 days for deposition answers by *Unzipped Apparel LLC v. Bader* (2007) 156 Cal. App. 4th 123, 136.

2. Mailing of a Court Order Extends the Motion Deadline

Defendant's argument is, in part, premised on the fact that Code of Civil Procedure section 1013(a) discusses service by mail and its effect:

> "Service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail within the State of California."

That applies to service of discovery, of discovery motions, and of court orders. See, e.g., *Shearer v. Superior Court* (1977) 70 Cal. App. 3d 424. There, the Court ruled that the time for filing a petition for a writ of mandate was extended by five days because the Court served the notice of ruling at issue by mail. In *California Accounts, Inc. v. Superior Court* (1975) 50 Cal. App. 3d 483, the Court ruled the extension for service by mail applied to discovery motions. Code of Civil Procedure section 1013 is "a procedural statute of general application." *Poster v. Southern California Rapid Transit* District (1990) 52 Cal. 3d 266, 273.

The Court's November 9, 2016 order was mailed on November 13, 2016. The fact it was mailed extended the 30 days of tolling to 35 days. The instant discovery motions could be filed on or before November 23, 2016.

3. The Motions Filed After November 23, 2015 Are Untimely

Anderson's former counsel states she read the Court's order on November 19, 2016. However, she did not file the discovery motions for the form interrogatories until November 25, and the motions for the document demands until December 1, 2015. The materials provided in Lynch's supplemental declaration at Exhibit H do not adequately demonstrate problems with electronic filing of those motions on November 23, 2015.

Because of this, the motions to compel further responses to the form interrogatories and to the document demands are untimely, and the Court has no jurisdiction to grant them.

4. Merits of Motions Pertaining to Requests for Admission

Code of Civil Procedure section 2033.280 states, in part (emp. added):

> "If a party to whom requests for admission are directed fails to serve a timely response, the following rules apply:
>
> (a) The party to whom the requests for admission are directed waives any objection to the requests, including one based on privilege or on the protection for work product under Chapter 4 (commencing with Section 2018.010). The court, ***on motion***, may relieve that party from this waiver . . ."

Plaintiff Hubbell has never made a motion for relief from waiver. No relief can be granted because the statutory requirement of a motion has not been met. "[W]e interpret use of the term 'motion' rather than 'ex parte application' as imposing the notice and hearing requirements generally applicable to motions." *St. Paul Fire & Marine Ins. Co. v. Superior Court* (1984) 156 Cal. App. 3d 82, 86, see also *Trail v. Cornwall* (1984) 161 Cal. App. 3d 477, 487. Brown & Weil, Civil Procedure Before Trial (TRG 2016) section 8:1465 also notes that one who seeks such relief must have "filed a noticed motion . . ."

In *Pelton-Shepherd Industries, Inc. v. Delta Packaging Products, Inc.* (2008) 165 Cal. App. 4th 1568, the Court made a similar finding. It ruled that absent a motion to set a new discovery motion cut-off date, the trial court abused its discretion in hearing the discovery motion at issue. In doing so, it relied on Code of Civil Procedure section 2024.050, which calls for a motion for leave to file a late motion and/or to reopen discovery. Because no motion for leave or to reopen the cut-off was made, no discovery motion could be heard. See the discussion on pages 1586 – 1588.

As plaintiff Hubbell did not seek relief from waiver of objections via a noticed motion, the failure to timely serve the responses to the requests for admission serves to waive all objections. The two motions to compel further responses to the requests for admission, without objections, are therefore granted.

5. Sanctions

As each party has prevailed on some issues and lost on some issues, the Court declines to grant sanctions to either party.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 4/25/16 .
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***De La Luz Lopez v. Gibson Wine Co. et al.***
Court Case No. 13 CECG 01745

Hearing Date: April 26, 2016 (Dept. 503)

Motion: Plaintiff's Motion to Tax Costs of Applied Process Cooling Corp.
Cross-Complainants' Motion to Tax Costs of Applied Process Cooling Corp.
Minor's Compromises (3)

Tentative Ruling:

To grant the motions to tax cost in part and deny them in part. Plaintiff shall pay $8,128.06; Munoz, Sr. shall pay $4,677.60, and the Llamas children shall pay $2,517.11 in costs of suit to APCCO.

For the reasons stated herein, it is the court's intention to award costs of suit against each of the minors in the amount of $472.50 and attorney's fees of $11,497.66. New orders will need to be submitted.

Explanation:

Motions to Tax/Strike Costs

Item No. 1 – Filing and Motion Fees:

Plaintiff and cross complainants seek to have the filing fees apportioned between them equally. In *Santantonio v. Westinghouse Broadcasting Co*. (1994) 25 Cal.App.4th 102, the court awarded costs against the one unsuccessful plaintiff (of three plaintiffs) in an employment discrimination action who rejected a Code of Civil Procedure section 998 settlement offer by dividing the total costs into thirds and awarding a third. (*Id*. at pp. 124-125.) Thus, a trial court may apportion costs among those liable for them.

The total costs claimed for filing and motion fees is $1,879.00. The costs are comprised of the fee to answer the complaint and cross-complaint and the filings fees for the motions for summary judgment as to the complaint and cross-complaint. The plaintiff and cross-complainant Munoz, Sr. generally agree that they should each bear responsibility for 50% of these costs. Cross-complainants Llamas children assert that cannot be held liable for costs incurred before their appearance in the case. This is correct. (*Catello v. I.T.T. General Controls* (1984) 152 Cal.App.3d 1009, 1015 [Intervenor held liable for costs in same manner as original parties and "will be limited to those costs incurred while the intervenor was a party to the action."].)

Plaintiff Maria De La Luz Lopez will be allocated $935.00 of the costs and Robert Munoz, Sr. will be allocated $935.00 of the costs charged in Item 1.

Item No. 4 – Deposition Costs:

Both Plaintiff and cross-complainants assert that the deposition costs must be reduced then apportioned between them. Both plaintiff and cross-complainant Munoz, Sr. claim the deposition costs must be taxed by $2,406.48, eliminating the cost of taking the deposition of Yuliana Correa (travel and transcript), Tammy Wallace (travel and transcript), and Colleen McLaurin.

The Llamas children point out that these deposition were taken before their appearance. Accordingly these costs are not properly chargeable to them.

However, plaintiff and Munoz Sr. are properly charged with the cost of these depositions. "If the items [in a memorandum of costs] appear to be proper charges, the verified memorandum is prima facie evidence that the costs, expenses and services therein listed were necessarily incurred by the defendant, and the burden of showing that an item is not is properly chargeable is upon the objecting party. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 131.) In order to meet this burden, where the objections are based on factual matters, the motion should be supported by a declaration. (*County of Kern v. Ginn* (1983) 146 Cal.App.3d 1107, 1113-4.) The charges for the depositions and travel are facially proper.

Plaintiff's counsel's David J. Castenholz asserts the depositions "had nothing to do with the claims against APCCO" and thus their cost cannot be charged against plaintiff. (Castenholz Decl. ¶ 6.) Counsel claims that Wallace and McLaurin were deposed as employees of Placement Pros for the specific purpose of addressing Gibson's defense that decedent was a special employee for the purposes of the application of the Worker's Compensation exclusivity rule. (*Ibid*.) Munoz, Sr. makes similar claims. (Fowler Dec. ¶ 9.) However, APCCO was sued, in both the complaint and the original cross-complaint along with Gibson. Their liability at the time was joint and several. It behooved APCCO to attend depositions relating to its co-defendant's defenses. Moreover, as set forth in the declaration of Linda I. Yen, Collen McLaurin was identified as the PMQ at the temporary agency that employed decedent relative to decedent's work at Gibson and was identified as the temporary service's Regional Safety Manager. APCCO did not know what the women would say before the depositions were taken. It was reasonably necessary to take the depositions of both women to investigate the working conditions of Gibson, and the nature of the accident, and the nature of Gibson's worker's compensation defense.

As for the deposition of Yuilana Correa, Ms. Correa is the mother of the Llamas children and was the live-in girlfriend of decedent. It was her testimony that disclosed, for the first time, that the Llamas children might have been economically supported by decedent such that they were proper wrongful death plaintiffs. Because there may be only a single wrongful death action in which all heirs must be joined, it was reasonably necessary for APCCO to determine whether Ms. Correa and/or her children were proper wrongful death plaintiffs.

Plaintiff and cross-complaint, Munoz, Sr. should bear the costs of the Wallace, McLaurin and Correa depositions evenly, with a share of $1,203.24 to each.

With respect to the deposition subpoenas for records, cross-complainants assert that APCCO failed to disclose the dates these deposition subpoenas were served and that they likely were served before the Llamas children appeared. The date that the subpoena is served is not a required item on a Memorandum of costs. Again, the burden is on the party challenging costs to prove the costs are not properly chargeable, though a declaration where the matter is factual. . (*County of Kern v. Ginn*, *supra*, 146 Cal.App.3d at pp. 1113-4.) Because a party subpoenaing records must serve all parties who have appeared (Code Civ. Proc., § 2025.220, subd. (b)), counsel for cross-complainants is in a position to determine whether the challenged subpoenas were served before his clients' appearances. As he has not done so, his clients must bear these costs.

Cross-complainants do have a valid argument as to the records pertaining only to plaintiff Maria De La Luz Lopez's medical records and as to the records pertaining to Controlled Atmosphere. Plaintiff will bear all the charges for items a, b, l, j, n and o, equaling $933.34. The remainder, $1,226.09 will be divided equally between plaintiffs and cross-complainants. Thus, plaintiff will pay $1,546.38 and cross-defendants will pay $613.05 with respect to the business records subpoenas.

As for the remaining depositions totaling $8,360.36, plaintiff and cross-complainants shall bear the costs equally, $4,108.18. Accordingly, plaintiff shall pay $6930.06 in item 4 costs. Munoz, Sr. shall pay $3600.10 and the Llamas children shall pay $2396.61.

Item No. 5 – Service of Process

Plaintiff and cross-complainants request that the service of process costs be equally allocated. This is reasonable. Plaintiff shall pay $211, Munoz, Sr. shall pay $105.50 and the Llamas children shall pay $105.50.

Item No. 8 – Witness Fee

Plaintiff and cross-complainants seeks to strike this witness fee because Yuliana Correa was not a witness designated by plaintiffs or cross-complainants. As set forth above, she was an important witness with respect to the identity of wrongful death plaintiffs and the witness fee is fully chargeable to the parties who had appeared at the time of Ms. Correa's deposition. Plaintiff must pay 50% and cross-complainant Munoz, Sr. must pay the other 50%.

Item No. 12 – Court Reporter Fees

Plaintiff and cross-Complainant agree that the fees should be split equally. Plaintiff shall pay $30.00, Munoz, Sr. shall pay $15.00 and the Llamas children shall pay $15.00.

Minors' Compromises

Because the minors argued persuasively that they should not pay opposing party's costs incurred before they appeared in the lawsuit, the court believes they should not pay any share of their own counsel's costs incurred before they appeared in the law suit. Very loosely estimating costs incurred after June 22, 2015, the Court came up with a total of around $6,342.25. The 7.45% pro rata share of this number is $472.50.

As the court will approve the 33.33% contingency agreement, the court will approve an attorney's fee of $11,497.66 per child. New orders will need to be submitted.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 4/25/16 .
(Judge's initials) (Date)